Dismissed and Memorandum Opinion filed April 8, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00700-CV

J.A. ASAFI, AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF ALOSIA SMITH RAUSCHER, DECEASED, AND TODD REAGAN SMITH, Appellants

V.

THE VANGUARD GROUP, INC., Appellee

On Appeal from Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 381,121

MEMORANDUM OPINION

J.A. Asafi, as administrator of the Estate of Alosia Smith Rauscher, Deceased, and Todd Reagan Smith (allegedly sole beneficiary of the estate) (collectively "appellants") appeal from the trial court's dismissal of their lawsuit against The Vanguard Group, Inc. Appellants sued Vanguard for refusing to provide information pertaining to financial accounts in which appellants contended Alosia Rauscher may have had an interest at the

time of her death. The trial court granted Vanguard's special exceptions and dismissed the case with prejudice. On appeal, the parties dispute whether the trial court properly dismissed the lawsuit. We dismiss the appeal for want of jurisdiction.

Background

Alosia Smith Rauscher died on June 12, 2008. She was survived by her son Todd Reagan Smith and her husband at the time of her death, Martin Rauscher. According to appellants' pleadings, Smith was the sole beneficiary of Alosia's will, and Asafi was named as the administrator of her estate. Appellants sued Martin in a lawsuit filed prior to the current lawsuit. In that prior lawsuit, appellants principally sought a determination of ownership in certain accounts Martin and Alosia held jointly with Vanguard. Appellants contend that during the course of this earlier lawsuit, they also sought information from Vanguard regarding accounts owned by Martin, and in which appellants believed the estate might have an interest, but Vanguard refused to provide the requested information. According to appellants, they made repeated requests of Vanguard, including in the form of a deposition on written questions and interrogatories. The trial court granted partial summary judgment favoring Martin, based on Martin's assertion that the joint accounts passed to him through nontestamentory transfer. Appellants maintain that an appeal will be taken from this ruling.

In the present action, Asafi filed an original petition and two amended petitions before Vanguard filed special exceptions, asserting that Asafi had failed to state a cause of action. Vanguard also moved to dismiss Asafi's lawsuit if he did not amend his pleadings to cure the alleged defect. Asafi thereafter filed his third amended pleading, which was the live pleading at the time the trial court granted Vanguard's exceptions and entered the order of dismissal. In the third amended petition, Smith was added as a plaintiff. His name appears in the style of the third amended petition, and specific claims are added to the petition for him, including a claim for tortious interference with inheritance rights. Smith

also signed the third amended petition as representing himself "pro se." The petition includes a certificate of service signed by Asafi, who represented himself in the lawsuit.

Appellants additionally filed a "Joint Response" to Vanguard's special exceptions and motion to dismiss. In this response, appellants specifically reference Smith's individual claims against Vanguard. Vanguard did not file any further special exceptions or motions for dismissal. The trial court granted the previously filed special exceptions and dismissed the case with prejudice.

Discussion

Generally, an appeal may be taken only from a final judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). A judgment is considered final for purposes of appeal if it disposes of all pending parties and claims in the record. *Id.* Except for a few, mostly statutory, exceptions, if a judgment from which a party has appealed is not final, but is instead interlocutory, then the court of appeals must either abate the case or dismiss it for want of jurisdiction. *Id*. at 195-96. The substance of the present case does not fall into any of the recognized exceptions. *See generally* Tex. Civ. Prac. & Rem. Code § 51.014 (authorizing interlocutory appeal under certain circumstances).

Here, the trial court's order specifically sustained Vanguard's special exceptions and ordered that "Plaintiff's cause of action be dismissed with prejudice." The order does not list Smith in the style and does not contain any language suggesting that it should be considered final as to Smith or the claims raised by Smith in the third amended petition. The exceptions sustained in the order, having been filed prior to the third amended petition, likewise do not address Smith's participation in the case.

In its appellate brief, Vanguard contends that Smith is not properly a part of this appeal, or the case as a whole, because he did not properly intervene in the proceedings

prior to judgment. Thus, according to Vanguard, it is immaterial that the trial court's order did not address Smith or his claims. Vanguard cites *Diaz v. Attorney General of Texas* for the proposition that for a party to intervene in a lawsuit it must file a written petition in intervention before rendition of judgment. 827 S.W.2d 19, 22 (Tex. App.—Corpus Christi 1992, no writ). While we agree with this pronouncement in *Diaz*, it does not aid Vanguard's cause. Under Rule 60 of the Texas Rules of Civil Procedure, "[a]ny party may intervene by filing a pleading . . . ." Tex. R. Civ. P. 60. Smith did just that; he filed a joint pleading with Asafi: the third amended petition. *See, e.g., Sw. Const. Receivables v. Regions Bank*, 162 S.W.3d 859, 866-67 (Tex. App.—Texarkana 2005, pet. denied) (treating parties whose names and claims were added to amended petition as intervenors); *In re Jobe Concrete*, No. 08-01-00351-CV, 2001 WL 1555656, at *4-5 (Tex. App.—El Paso Dec. 6, 2001, orig. proceeding) (same).

Vanguard additionally argues that Smith does not have the right to intervene in this lawsuit. However, Vanguard did not make this argument below, and it clearly was not a basis for the trial court's order. Under Rule 60, "[a]ny party may intervene . . . subject to being stricken out by the court for sufficient cause on the motion of any party." A court, however, cannot strike a petition in intervention absent a motion to strike. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990); *Neely v. Hubbard*, No. 01-02-00160-CV, 2004 WL 35809, at *3 (Tex. App.—Houston [1st Dist.] Jan. 8, 2004, no pet.). Vanguard did not file a motion to strike the intervention; thus, the trial court's dismissal of the case cannot be interpreted as striking the intervention.

Because the trial court's order did not dispose of Smith's claims, that order was interlocutory. Consequently, we do not have jurisdiction to consider the merits of Asafi's appeal.

We dismiss the appeal for want of jurisdiction.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.